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No. 91-863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JANET BARBE

Petitioner,

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.
and
W. E. ZENTGRAF

Respondents.

On Petition For a Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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BRIEF OF RESPONDENTS, THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. AND W. E. ZENTGRAF, IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Where petitioner's common law claims of defamation and intentional infliction of emotional distress allegedly arose from the respondents' transmission to the union of the notice of her termination, which transmission was required implicitly under the terms of the applicable collective bargaining agreement, should this Court review the judgment of the United States Court of Appeals for the Fourth Circuit holding that resolution of such claims requires interpretation of the collective bargaining agreement and such claims are preempted, therefore, by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185?[1]

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[1] Petitioner's Statement of the Question Presented (petition ["pet."], p. i) is incorrect in that respondents did not and do not rely on so-called "defensive" preemption of petitioner's claims but on the total preemption of such claims because of their exclusively federal nature. Petitioner's statement also mischaracterizes the claims as "garden variety" when the common law torts alleged arose only because of obligations which arguably inhere in the particular collective bargaining contract whose construction is at issue here.

PARTIES IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Great Atlantic & Pacific Tea Company, Inc.[2]

W. E. Zentgraf

Janet Barbe

[2] Respondent, The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), a corporation organized under the laws of the state of Maryland, is a publicly traded company. A&P is informed that at December 13, 1991, Tengelmann Warenhandelgesellschaft, a partnership organized under the laws of the Federal Republic of Germany, was the beneficial owner of 53.2 per cent of the outstanding shares of A&P. All subsidiaries of A&P are wholly owned subsidiaries.

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OPINION BELOW

The unreported opinion[3] of the United States Court of Appeals For The Fourth Circuit is reprinted in Appendix A to the petition at 1a-10a, cited herein as "___ a". The opinion of the United States District

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[3] Under the Internal Operating Procedures of the Fourth Circuit, I.O.P. Nos. 36.5 and 36.6, "[u]npublished opinions are not binding precedent in [the Fourth] circuit."

Court for the District of Maryland, which was affirmed by the United States Circuit Court of Appeals for the Fourth Circuit, is reported at 722 F. Supp. 1257 (D. Md. 1989), reprinted in Appendix B to the petition at 1b-17b, cited herein as "___ b".

The applicable collective bargaining agreement was part of the record in the courts below (Joint Appendix, pp. 21-45). Relevant excerpts from that agreement are reprinted in Appendix A to this Opposition, cited hereafter as "Resp. Opp. ___ a".

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition at p. 2.

STATUTES INVOLVED

The statute principally involved is § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("§ 301"), and is set forth in the petition at pp. 2-3. The statute under which the case was removed to federal court is set forth in the petition at p.3.

COUNTERSTATEMENT OF THE CASE

Petitioner Janet Barbe ("petitioner") seeks review of the unpublished *per curiam* Opinion and Order of the United States Court of Appeals for the Fourth Circuit entered on July 26, 1991. That Order dismissed as preempted by § 301 the claims of defamation and intentional infliction of emotional distress made by petitioner under the common law of the state of Maryland against respondents, The Great Atlantic & Pacific Tea Company, Inc. ("A&P") and W.E. Zentgraf, hereinafter sometimes jointly referred to as "respondents". 2a, 10a.

Petitioner was employed by A&P as a bakery clerk in 1984. 2a, 2b. She was represented for collective bargaining purposes by Local 27 of the United Food & Commercial Workers Union ("union" or "Local 27"), which had a collective bargaining contract ("contract" or "agreement") with A&P in effect from September 14, 1986 through September 16, 1989. The contract recognized the union as the exclusive representative of its bargaining unit employees, including petitioner. *Id.* Believing that petitioner had falsified a worker's compensation claim, A&P, through its personnel director Zentgraf, sent a letter to petitioner dated April 7, 1987, notifying her that ". . . effective March 31, 1987, you are terminated for falsification of [a] company document." *Id.* Copies of the letter were forwarded to petitioner's two supervisors and to the union. *Id.*

A&P sent the notice letter to the union pursuant to various provisions in the contract which it believed required such notice, although the contract contains no explicit provision obliging such notice.[4] The notice

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[4] For example, section 5 of article 4 of the agreement stated:

> The Employer agrees to advise the Union of . . .all terminations. . . on a monthly basis." Resp. Opp., ___ a.

Section 8 of article 4 of the contract gave A&P ". . .the right to discharge . . . any employee for good cause, including . . . dishonesty", while Article 10 established a mandatory grievance and arbitration procedure for resolution of disputes ". . . concerning the interpretation of the provisions of th[e] Agreement." Resp. Opp., ___ a.

Section 2 of article 10 of the agreement provided:

> "Upon receipt of notice [of a controversy, dispute or disagreement as defined in section 1] from either party, the representative of the Employer and the

letter was a statement of cause transmitted to the union to make effective the mandatory and exclusive grievance and arbitration procedures set forth in article 10 of the contract. 4a; 10b; 11b. After the union invoked the contract's grievance procedure, A&P immediately rescinded the termination letter and gave petitioner two (2) successive six (6) month leaves of absence. 3a; 3b. Petitioner sought no further relief under the contract. *Id.*

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representative of the Union shall, within three (3) days, commence discussion in an attempt to reach a settlement of the controversy." Resp. Opp., ___ a.

Section 5 of article 10 of the agreement stated:

> "All complaints must be filed, in writing, within thirty (30) days after occurrence of the matter in dispute [or] disagreement, provided that any complaints in reference to dismissal must be filed, in writing, to the Employer within ten (10) days from the date of dismissal. Complaints not filed within the limits herein specified shall have no right of appeal by any party involved."

Section 7 of article 10 of the agreement stated:

> "Since it is the desire of the parties to expedite the handling of all grievances, they therefore agree that the time limits prescribed must be followed, unless agreed to by the Union and the Employer. The party failing to move forward as required shall be deemed to have withdrawn the grievance. All notices required herein shall be in writing." Resp. Opp., ___ a.

Finally, in the general preamble to the contract, "The Employer and the Union each represent that the purpose and intent of this Agreement is to . . .provide a channel through which information and problems may be transmitted from one to the other." Resp. Opp., ___ a.

Petitioner filed suit in the Circuit Court of Maryland for Baltimore County, charging under the common law of the State of Maryland that the sending of the termination notice letter to the union was defamatory and intentionally inflicted emotional distress upon her. 3a; 2b.[5] Respondents removed the case to the United States District Court for the District of Maryland and asked for dismissal on the ground of total federal preemption by § 301. Petitioner opposed and asked that the case be remanded to state court. 3a; 3b, 4b.

After setting forth each of the elements of the claims under Maryland law, the district court found that resolution of at least two (2) necessary elements of the tort of defamation, *i.e.*, publication and privilege, would draw the court into interpreting important rights and obligations of notice to the union pursuant to the labor contract. 13b. The court also held that disposition of the claim of intentional infliction of emotional distress required the determination whether A&P, in sending the notice letter to the union, was engaging in a permissible exercise of its rights and duties under the labor contract. 14b. For these reasons, the court found these claims preempted by § 301. Under § 301, petitioner had to exhaust the exclusive grievance and arbitration procedures of the collective bargaining agreement and to file her claims within the applicable six month limitation period established by § 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 10(b). Since petitioner

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[5] Petitioner conceded that the letter was properly sent to her two (2) supervisors and that such communication was privileged. 2b

failed to do so, the district court granted summary judgment to respondents. 15b-16b.

Petitioner appealed to the United States Circuit Court of Appeals for the Fourth Circuit. 2a. Based upon the analysis for determining § 301 preemption set forth in *McCormick v. AT&T*, 934 F.2d 531 (4th Cir., May 28, 1991) (*en banc*), the court affirmed the dismissal. 5a. As to the defamation claim, the court found that whether the sending of the termination notice to the union constituted publication, or was privileged, depended on whether the contract "... authorized, or perhaps even anticipated, such a notice." 4a. Similarly, to resolve the claim of intentional infliction of emotional distress, the court would have to decide whether A&P's transmission of the notice was in compliance with the contract. 4a. For these reasons, the claims were preempted by § 301, and dismissed as untimely. 3a.

REASONS FOR DENYING THE WRIT

Summary of Argument

Petitioner has raised no issues of sufficient importance to justify review of the decisions below under Rule 10 of the Rules of this Court or other authority. Her challenge instead is directed to the application by the courts below of well-established precedent to the particular facts of the case at hand, a palpably insufficient basis to invoke the discretionary jurisdiction of this Court. On the facts of this case, there is no conflict among the circuits as to either the legal standards applicable under § 301 to petitioner's claims or to their proper resolution, nor is there any broad federal question which this Court should address. The differing results among the circuits in several cases

presenting generically similar tort claims have turned on the individualized fact patterns presented in each case and on the elements of the torts under state law, not on the considerations erroneously identified by petitioner. Those cases are not even remotely comparable to the case at bar. In this regard, in a case whose fact pattern mirrors that in this case, the United States Circuit Court of Appeals for the Ninth Circuit, like the Fourth Circuit in this case, found total preemption by § 301. *See, e.g., Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057 (9th Cir. 1989).

The decisions by the courts below were quite clearly correct in that they considered carefully and applied faithfully the teachings which have emerged from this Court in recent precedent construing the scope and reach of § 301 preemption. The decision of the Fourth Circuit, moreover, was in the form of an unpublished[6] *per curiam* decision which, for that reason, is of distinctly limited precedental effect. Finally, the communication at issue was absolutely privileged under federal law.

For all these reasons, the dismissal of petitioner's common law claims should not be reviewed by this Court.

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[6] I.O.P. 36.6 of the Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit provides:

> "In the absence of unusual circumstances, this court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this court's unpublished disposition in briefs and oral arguments in this court and in the district courts within this circuit is disfavored. . ."

I. As Applied to the Fact Pattern of this Case, There is No Conflict Among the Circuits Regarding the Preemptive Effect of § 301

Given the unique set of facts presented here, none of the circuit court precedent relied upon by petitioner supports her claim for review. Rather, these cases simply attest to the efforts of these several courts to apply to the particular facts in the cases before them the legal standards developed by this Court in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), and other cases decided by this Court construing § 301. Since such decisions always turn on consistent legal standards applied to widely disparate fact situations, it is unsurprising that different facts have led to different outcomes. In no manner does that suggest, as petitioner argues, that any of these circuits, if presented with the facts of this case, would decide this case differently from the courts below.

Each of the cases in the survey of the law of the circuits conducted by petitioner (pet., pp. 10-20) is easily distinguishable on its facts from this case.[7] That

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[7] Krashna v. Oliver Realty Inc., 895 F.2d 111 (3rd Cir. 1990) involved a claim of intentional infliction of emotional distress by a garage attendant represented by a union who claimed he was wrongfully discharged after filing a workers compensation claim. Although the court held the claim not to be preempted by § 301, there was no suggestion, as there is in this case, that the employer's conduct was mandated by the labor contract.

In O'Shea v. The Detroit News, 887,F.2d 683 (6th Cir. 1989), the claim of intentional infliction of emotional distress was based on the employer's transfer of a unionized older employee to the night shift pursuant to discretion given it under the labor contract. The transfer was not made pursuant to any contractual requirement.

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survey also shows that no hard and fast inter- or intra-circuit rules can be said to apply to the dispositions in each case. For example, separate panels in each of the sixth, seventh and ninth circuits[8] have found both for and against preemption by § 301 of claims of defamation and/or intentional infliction of emotional distress, with the variance in results due in each instance to the different facts in each case.

The case most analogous to this case is one not cited by petitioner, *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057 (9th Cir. 1989). There, discharged employees brought claims under state law, *inter alia*,

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F.2d 133 (7th Cir. 1987) presented claims of defamation and intentional infliction of emotional distress which arose from abusive remarks to a union member by a supervisor, conduct ". . .not even arguably sanctioned by the labor contract." Id., at 138. To the same effect is Tillez v. Pacific Gas & Electric Co., 817 F.2d 536, 539 (9th Cir. 1987). And, see also, Jackson v. Southern California Co., 8817 F.2d 638 (9th Cir. 1989) where the intentional infliction of emotional distress claim was held to be preempted but the defamation claim was not because the circularization of an alleged defamatory letter to twelve (12) employees was not required by the labor contract. Here, in direct contrast, respondents contend that the conduct complained of, *i.e.*, notice to the union, was necessary because of the agreement.

[8] Compare Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir. 1989) (no preemption by § 301) with Knafel v. Pepsi-Cola Bottlers of Akron, Inc., 850 F.2d 1155 (6th Cir. 1988) (preemption by §301). Compare also, Keehr v. Consolidated Freightways of Delaware, Inc. (no preemption) supra, with Douglas v. Information Technologies, 877 F.2d 565, 572 (7th Cir. 1989) (preemption); compare also Jackson v. Southern California Gas Co., supra, (no preemption) with Tillez v. Pacific Gas & Electric Co., supra, Chmiel v. Beverly Wilshire Hotel Company, 873 F.2d 1283 (9th Cir. 1989) (preemption) and Hyles v. Mensing, 849 F.2d 1213 (9th Cir. 1988) (preemption).

for defamation and intentional infliction of emotional distress based on discharge notices which cited the destruction of company property and harassment of other workers as the reason. The claims were held preempted by § 301 both because the notices were required by the labor contract and because the claims amounted to complaints about the administration of discipline under the labor contract. In other words, on comparable facts, the ninth circuit (which has ruled both for and against preemption by § 301 of state law tort claims, see f.n. 9, 10, *supra*), like the courts below, found preemption by § 301.

The conflict among the circuits sought to be manufactured by petitioner is, therefore, a fiction because petitioner cites no truly apposite authority. Petitioner is also flatly wrong in arguing that "...the courts cannot decide whether preemption under § 301 should be based on the plaintiff's reliance on the collective bargaining agreement for its state law claim, or the defendant's reliance on the collective bargaining agreement for its defense." (pet., p. 8). To our knowledge, no circuit court—certainly not the courts below—has relied on such a simplistic and manifestly incorrect formulation. Instead, in line with the teachings of this Court, these courts have simply recognized that the preemptive effect of § 301 can be "...so 'extraordinary' that it 'converts an ordinary state common law complaint into one stating a federal claim for purpose of the well-pleaded complaint rule.'" *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), *quoting Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). Preemption by § 301 has such a "converting effect"—and becomes complete preemption as opposed to defensive preemption - when resolution of

the claim requires interpretation of the labor contract. It is this latter inquiry to which the various circuit courts have directed their attention and which has produced different outcomes under § 301. It is also the reason why the courts below found total preemption of petitioner's claims in this case. 4a, 5a; 13b, 14b.

II. Because the Decisions of the Courts Below Turned on Facts Unique to this Case, the Discretionary Review Jurisdiction of this Court Should Not be Exercised

This case, far from being "garden variety" (pet., p. i) in nature, springs directly from obligations of notice rooted in the contract. Petitioner's claims of common law torts in this case depend entirely on whether the labor contract did, or did not, require notice to the union of the petitioner's termination and the reasons therefor. That mixed question of fact and law is the central issue upon which resolution of each of petitioner's common law tort claims depend. It is perforce a federal question because, to answer it, the courts below had to assess the record facts and interpret the contract. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Lingle v. Norge Div. of Magic Chef, Inc., supra.*

Petitioner does not and cannot quarrel with the well-established legal principles identified by the courts below which guided their application of § 301 but simply challenges their application to the particular facts in this case. It is not the function of certiorari, however, to give a disappointed litigant another chance at appellate review. *Magnum Import Company, Inc. v. Coty*; 262 U.S. 159, 163 (1923). Nor is it the practice of this Court to grant review to

review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Inasmuch as the decisions of the courts below turned upon their determination that the labor contract had to be interpreted in light of its various provisions (*see*, f.n. 4, *supra*) to decide whether singly or together they required notice to the union, this case is not an appropriate vehicle for review by this Court.[9]

III. The Decisions by the Courts Below Were Clearly Correct

In this case, acting pursuant to custom and practice and its own understanding of its obligations under the contract, A&P advised the union of petitioner's termination and the reasons therefor. A&P did so to comply with various parts of the contract which arguably require such notice so that the union could fulfill its representational function. 3a; 4a; 2b; 10b; f.n. 4. Indeed, A&P's failure to do so might well have given rise to liability for circumventing the bargaining representative of the employees in violation of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, or may have resulted in an untimely grievance, to the detriment of petitioner's interests. 12b. Petitioner

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[9] Indeed, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949); Berenvi v. Immigration Director, 385 U.S. 630, 635 (1967); Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); Rogers v. Lodge, 458 U.S. 613, 623 (1982); United States v. Doe, 465 U.S. 605 (1984); NCAA v. Board of Regents, 468 U.S. 85, 98 n.15 (1984).

charged nonetheless that the very act of notice to the union subjected A&P to common law tort liability.

§ 301 grants to federal courts jurisdiction over "[s]uits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . .".[10] § 301 preempts all state law claims for violation of rights under a collective bargaining agreement, and extends to tort suits brought under state law when ". . . resolution of a state law claim is substantially dependent uponanalysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, *supra* at 211 (1985); *see also*, *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983).

In disposing of petitioner's claim, the courts below applied the fundamental principle announced by this Court that ". . .state law is preempted by § 301 only if such application requires the interpretation of a collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, *supra* at ___ .4a; 7b, 8b. In applying *Lingle*, the courts below correctly recognized that there is simply no way to resolve such claims except by reaching into the labor contract to deter-

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[10] This Court has held expressly that "[t]he preemptive force of § 301 is so powerful as to displace entirely any state cause of action" within its scope. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 23 (1983). A tort action brought nominally under state law is, when preempted by § 301, "federalized"—i.e., "any civil complaint raising this select group of claims is necessarily federal in character," Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 63 (1987), and "[a]ny such suit is purely a creature of federal law." Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 56 (1987).

mine the nature and extent of A&P's obligation to notify the union concerning the discharge of an employee whom it represents, and what, if any, privilege attaches to such a communication. 4a; 12b.

This is evident from the analyses of the courts below which, as a first step, identified each of the constituent elements of the state tort claims. In Maryland, for example, defamation consists of proof of (1) publication of a false and defamatory communication (2) with knowledge of or reckless disregard of its defamatory character (3) which caused damage. *Metromedia Inc. v. Hillman*, 285 Md. 161, 172 (1979); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 596-97 (1976); 4a, 9b. Given the nature of petitioner's claim, the court would have to decide whether notice to the union constituted publication under Maryland law, *i.e.*, whether the agreement ". . .authorized, or perhaps even anticipated, the sending of such a notice." 4a. As the district court noted:

> "Were the Court to rule that the defamation claim was independently resolvable, it would necessarily be concluding A&P had no duty to notify the union and would necessarily be making an interpretation of the collective bargaining agreement contrary to the position taken by the employer. It would be making a determination as to whether the preliminary steps of adjustment and arbitration as described in the collective bargaining agreement imply a notice requirement and whether the custom of the parties is to be inferred as part of the collective bargaining agreement." 12b.

On the other hand, if the court determined that notice to the union was necessary under the agreement, that decision would, in effect, negate petitioner's claim that there was a publication under state law. In either event, the question cannot be decided outside the express provisions and implied contours of the agreement.[11]

Related to these considerations, A&P claimed the communication to the union was privileged. *See*, e.g. *Pratt v. Delta Airlines, Inc.*, 675 F. Supp. 991, 997 (D. Md.1987); 4a, 9b. To rule on this privilege question, the courts below held, an assessment of the relative interests of A&P, Local 27 and petitioner with respect to notification of termination of a bargaining unit employee would have to be made in light both of the rights and obligations of the parties under the labor contract, and of the strong policy favoring federal uniformity. 4a; 12b; 13b; *see Allis-Chalmers*, *supra* at 211. .

The constituent elements in Maryland of the tort of intentional infliction of emotional distress are (1) intentional or reckless conduct (2) that is extreme or outrageous (3) and which caused severe emotional distress. *Harris v. Jones*, 281 Md. 560, 566 (1977); 4a; 13b. As found by the courts below, the question whether A&P's conduct was "reckless", extreme", or "outrageous" requires an assessment of whether A&P, in sending the termination notice, was simply

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[11] In this connection, the court must consider implied contract rights and implied obligations of notice which may be involved for "[t]he assumption that the labor contract creates no implied rights is not one that state law may make." Allis-Chalmers v. Lueck, supra at 215 (1985).

exercising its termination rights in a permissible way under the contract. *Id.* As the district court noted, "[i]f A&P complied with and satisfied the terms of the agreement, then [petitioner] would be hard pressed to urge that the conduct was outrageous." 13b-14b.

The courts below thus faithfully adhered to the principles announced by this Court in *Lingle* and its progeny, and reached the same result as reached by other circuit courts on comparable facts. *See, e.g., Shane v. Greyhound Lines, Inc., supra,* and *Hyles v. Mensing, supra.* For that additional reason, there is no basis for review of petitioner's claims.

IV. A&P's Letter of Notification to the Union Is Unqualifiedly Privileged

Statements made in the effort to obtain a peaceable disposition of a grievance have been held to be privileged unqualifiedly under federal common law. *General Motors Corporation v. Mendicki,* 367 F.2d 66, 70 (10th Cir. 1966). This privilege has been applied to the discharge letter required by the collective bargaining agreement as well. *Hasten v. Phillips-Petroleum Co.,* 640 F.2d 274, 279 (10th Cir. 1981); *Hyles v. Mensing, supra.*

Federal courts have recognized an unqualified privilege for statements made during the entire proceeding contemplated by the labor contract for the grievance machinery, including the employer's notification to the union of its actions. *Green v. Hughes Aircraft Co.,* 630 F.Supp. 423, 427-28 (S.D. Cal. 1985) (statements to union privileged and nonactionable as defamatory torts). There is an overriding federal labor policy to encourage, facilitate and effectuate the settlement of issues between employers and employees

which supports this absolute privilege. *Brooks v. Solomon*, 542 F.Supp. 1229, 1253 (N.D. Ala. 1982).

For the independent reason that the communication at issue is privileged under federal common law, the decisions below should not be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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